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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1289

ROLAND N. GODWIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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No.

ROLAND N. GODWIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioner Roland N. Godwin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in this proceeding on November 21, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, an order of court not yet reported, appears in the Appendix. (Appx. B. *infra*) The first opinion of the Court of Special Appeals of Maryland appears at 38 Md. App. 716, 382 A.2d 596 (1978), (Appx. A. *infra*) and the second opinion of the Court of Special Appeals

of Maryland is not yet reported. (Appx. C. *infra*) The opinion of the Court of Appeals of Maryland in the companion cases of *State v. Frye* and *Jones v. State*, Nos. 133 and 179, September Term, 1977, are not yet reported. (Appx. D. *infra*)

JURISDICTION

The opinion of the Court of Special Appeals of Maryland was entered on November 14, 1977, a timely motion for reconsideration was granted, and a revised opinion was entered on February 28, 1978 and the mandate issued on the same date. A timely petition for a writ of certiorari was granted by the Court of Appeals of Maryland and the opinion of that court was entered on November 21, 1978 and the mandate issued on December 21, 1978. On remand the opinion of the Court of Special Appeals of Maryland was entered on January 16, 1979 and the mandate issued on February 15, 1979. This petition for a writ of certiorari was filed within 90 days of the judgment of the Court of Appeals of Maryland. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the Sixth Amendment confrontation clause override the common law rule limiting impeachment to cross-examination of prosecution witnesses for convictions but not arrests and other bad acts?

2. Is a hearing constitutionally mandated when requested by the defendant in order for the trial court to rule on the admissibility of a prior identification?

3. Did the court below improperly apply the holdings in *Neil v. Biggers* and *Manson v. Brathwaite* concerning the impact of an impermissible extra-judicial confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

Petitioner, Roland N. Godwin was indicted in November of 1975 in Prince George's County, Maryland and charged along with co-defendants James "Reds" Person and Willie "Junior" Jones with *inter alia* three counts of murder, four counts of kidnapping, four counts of false imprisonment, four counts of assault and battery, four counts of use of a hand-gun, one count of carrying a hand-gun and one count of

transporting a hand-gun. Also indicated on related charges were Towanna A. Matthews and Johnnie M. Jones.

After arraignment but well before trial and pursuant to the Maryland Rules on March 15, 1976 petitioner Godwin filed a Motion to Supress all identification testimony in the case because said identification testimony was constitutionally defective because it was the result of impermissibly suggestive extra judicial confrontations. The State of Maryland filed an answer to that motion on March 29, 1976 and hearings were held in open court on March 30, 1976 on other pending motions. At that time the court granted petitioner Godwin's Motion for Severence and he was ordered to be tried separately from all co-defendants, and the court deferred until the time of trial the hearing on his Motion to Suppress identification testimony.

The case came on for trial in February of 1977 before a judge and a jury. After the swearing of the jury but before the first witness was called, the State moved orally for an Order In Limine to preclude any reference to any arrests which were not convictions of any prosecution witnesses. The court granted the state's motion over strenuous objection by petitioner Godwin's defense counsel. (T. 10-11) The court also ruled that the hearing on the Motion to Suppress identification testimony would be heard during the trial of the case.

The testimony bascially indicated that three black males rounded up and kidnapped four other black males, brought the four kidnapped victims to an isolated location where a young girl pointed out two of the four kidnap victims as perpetrators of a crime against her. Three of the four kidnap victims were then

shot to death, the fourth managed to escape.

The critical issue in the case was the identity of the three kidnapper-murderers.

Ronald Swayne testified that he was the only one of the four kidnap victims who survived the incident. Swayne testified that he knew two of his three assailants. He identified one of them as "Reds" Person and the other as "Junior" Jones. He described the third as only a tall, slim black man. Co-defendant Johnnie M. Jones was called as a prosecution witness and testified that she was the young lady who made the identification of two of the four victims and that she also knew two of the three kidnapper-murderers. She testified one of them was her brother, "Junior" Jones, the other was "Reds" Person and the third was a tall, slim black man.

The prosecution also called as a witness one Donald McCain who testified that on the night of the shooting he saw "Reds" Person and another individual near the scene of the shootings. McCain could only identify the individual with "Reds" Person as a tall, slim black man.

At the trial of the case, Johnnie M. Jones was unable to identify in Court the tall, slim black man. She testified however, that she saw the tall, slim black man on one occasion subsequent to the night of the incident. She testified that she saw the individual on March 30, 1976 when she was in court with the other defendants on all pending motions in the case. The prosecutor who was prosecuting that case was then called as a witness to testify that Johnnie M. Jones was in fact in court on March 30, 1976 and that present with her was Petitioner, Roland N. Godwin. The prosecutor then testified that Roland N. Godwin was present in court at

the trial. A hearing was never held at the trial of the case to develop the facts and circumstances surrounding the alleged identification by Miss Jones of Petitioner Godwin on March 30, 1976.

Witness Swayne testified that he too saw the tall, slim black man on an occasion subsequent to the night of the shooting. Swayne testified that when he was in custody in a District of Columbia Police Station he was presented with a one-on-one show-up on the other side of a one way mirror with the tall, slim black man. Swayne was told by a District of Columbia detective to "look at him good". Swayne then identified in court the tall, slim black man as the petitioner, Roland Godwin.

Witness McCain testified that he was handed one by one approximately 15 to 20 pictures by a Maryland detective. However, the detective testified that he presented a spread of 10 photographs to McCain. In any event McCain picked out a photograph of the tall, slim black man and that photograph was the petitioner, Roland N. Godwin.

The petitioner was found guilty on three counts of first degree murder, four counts of kidnapping and four counts of the use of a hand gun. He was sentenced to two life terms, four thirty year terms, four fifteen year terms, sentences to run consecutively.

Petitioner noted a timely appeal to the Court of Special Appeals of Maryland which in a written opinion affirmed his convictions and Petitioner then filed a timely petition for writ of certiorari to the Court of Appeals of Maryland which vacated the judgment of the COSA and remanded the case to that court. On remand the Court of Special Appeals affirmed the kidnapping convictions with respect to victim Swayne and the four hand-gun convictions, but

the court vacated the three murder convictions and the three kidnapping convictions because of a merger problem and remanded to the trial court for further proceedings. (See Appx. A.B.C. & D *infra*)

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD DECIDE THE PROPER SCOPE OF THE SIXTH AMENDMENT CONTRONTATION CLAUSE IN IMPEACHING PROSECUTION WITNESSES FOR BIAS AS DEVELOPED BUT NOT FINALIZED IN *DAVIS V. ALASKA*

The confrontation clause of the Sixth Amendment is applicable to the States through the due process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). The confrontation clause encompasses the right to impeach the credibility of prosecution witnesses by cross-examining them for possible bias or prejudice. *Davis v. Alaska*, 415 U.S. 308 (1974).

The scope of cross-examination is traditionally vested in the sound discretion of the trial judge subject to the constitutional safeguards of the confrontation clause. *Davis v. Alaska, supra.* There is, however, a serious conflict in the application of the confrontation clause to the area of impeachment cross-examination. The general rule is that a witness may not be impeached by inquiry into specific acts of misconduct which have not resulted in convictions. *United States v. Young*,

567 F.2d 799 (8th Cir. 1977), *cert. denied* 434 U.S. 1079 (1978), *Truman v. Wainwright,* 514 F.2d 150 (5th Cir. 1975) (Convictions but not Arrests Rule) However, a witness may be impeached by inquiry into actual or perceived agreements or deals with the prosecution and any other incentives for cooperation. *United States v. Crumley,* 565 F.2d 945 (5th Cir. 1978); *United States v. Mayer,* 556 F.2d 245 (5th Cir. 1977) (Bias and Prejudice Rule).

This case squarely presents the question of the application of the confrontation clause in reconciling this tension between the Convictions but not Arrests Rule and the Bias and Prejudice Rule. Specifically, does the confrontation clause allow cross-examination of a prosecution witness for bias and prejudice when the defense proffers numerous arrests of the witness without convictions, and a working relationship by the witness with law enforcement authorities?

In the instant case after the jury was sworn, but before the first witness was called, the State moved orally for an order *in limine*, "to preclude any reference to any arrests that are not convictions of any of our witnesses either in opening statement or otherwise." (T-10) The order was entered over the strenuous objection of defense counsel. (T-10-11) Nevertheless petitioner's counsel attempted to cross-examine the chief prosecution witness, Ronald Swayne, with respect to his working relationship as an informer with the Metropolitan Police Department of Washington, D. C. The Petitioner proffered that Swayne was involved in several robberies which were subsequently entered *nolle prosequi* by the prosectution in Washington, D. C., and that the witness had a working arrangement with the Washington, D. C. Police Department. The Court rejected this proffer and told petitioner's counsel

that he could not inquire of the witness concerning any prior bad acts or arrests which had not resulted in convictions or any arrangements with the prosecution. The trial court at that point threatened to put petitioner's counsel in jail if such cross-examination was attempted. (T.152-154)

A similar episode took place with respect to another key prosecution witness, Donald McCain. Petitioner's counsel proffered that the witness was a narcotics dealer, a prostitution procurer, involved with stolen automobiles, and associated with other criminals. However, the trial court refused to allow petitioner's counsel to ask any questions with respect to the prior arrests and prior bad acts of the witness because again there were no convictions. (T. 195-202)

In *Davis v. Alaska, supra* this court addressed the issue of the proper scope of the confrontation clause in dealing with impeachment cross-examination. This court stated that cross-examination directed toward revealing possible biases, prejudices or ulterior motives of the witness was proper but the court stated in another part of the opinion that one way of discrediting a witness is to introduce evidence of a prior criminal conviction of that witness. The court seemed to say that one could explore for biases or prejudices only by using criminal convictions of the witness.

However in the instant case the petitioner attempted to show the bias, the prejudice and the motive for testifying of two prosecution witnesses by demonstrating that they had a working arrangement with various police departments thus resulting in numerous arrests and numerous nolle prosses, but few convictions.

This court should issue a writ of certiorari in this case

to delineate the precise scope of the confrontation clause in the area of impeachment cross-examination and decide if the confrontation clause does in fact, under the proper circumstances, over-ride the common law rule of convictions but not arrests cross-examination.

II

THIS COURT SHOULD DECIDE THE PROPER SCOPE OF THE HEARING THAT IS REQUIRED TO DETERMINE THE ADMISSIBILITY *VEL NON* OF A PRIOR IDENTIFICATION

After arraignment, but before trial and pursuant to the Maryland Rules, petitioner Godwin filed a Motion to Suppress all identification testimony in the case on the grounds that its admission at trial would deny him due process of law because it was based upon unnecessarily suggestive pre-trial confrontations or extra-judicial confrontations. Subsequent to the filing of the Motion and the State's Answer thereto, hearings were held on other motions in open court with petitioner Godwin and all of his co-defendants, including witness Johnnie M. Jones.

At the trial of the case co-defendant and witness Jones was unable to identify, in court, the tall, slim black man whom she observed on the night of the shootings. She did testify, however, that she saw the tall, slim black man on one occasion subsequent to the night of the shootings which was in court at the hearings on March 30, 1976. The prosecutor of the case

at that time, E. Garrison Neal was then allowed to testify, over strenuous defense objection, that on March 30, 1976, witness Jones was in court with the petitioner Godwin. Neal then identified Godwin as being present in the court at the trial of the case below.

No hearing was ever held to develop the circumstances surrounding the March 30, 1976 court appearance of witness Jones and petitioner Godwin. Clearly, other persons were also present, and the defense did manage to proffer in the record that Jones and Godwin may have been handcuffed to one another during the hearing. It was also unclear from the prosecutor's testimony exactly which one of the other persons in the court room on March 30, 1976 with witness Jones she was identifying as the tall, slim black man. The Court of Special Appeals of Maryland concluded that this dual testimony was not a garden variety identification but it did present an elementary syllogism, the conclusion of which was that the tall, slim black man and the petitioner Roland N. Godwin were one and the same. (Appx A *infra*)

Petitioner concedes that he had a hearing concerning the issue of whether or not witness Jones could identify the tall, slim black man in Court. However, once it became clear that witness Jones was unable to make an in-court identification, the hearing with respect to the identification terminated. Her testimony concerning the prior confrontation which occurred at the hearing on March 30, 1976, was never developed at trial. The defense could only hastily proffer facts at the bench concerning handcuffs. In short, petitioner was allowed a hearing on the in-court identification but not allowed a hearing on the prior confrontation.

Thus, when the courts below applied the standards

of *Manson v. Brathwaite*, 432 U.S. 98 (1977) and *Neil v. Biggers*, 409 U.S. 188 (1972), they did so on an incomplete record. This court held in *Jackson v. Denno*, 378 U.S. 368 (1964) that a defendant has a constitutional right to have a full evidentiary hearing at the trial court level on the issue of the admissibility of an extra-judicial statement. The instant case squarely presents the issue of the constitutional necessity and the scope of a hearing concerning the reliability of a prior identification.

This court should issue a writ of certiorari in this case to decide whether a hearing is constitutionally mandated and if it is, the scope thereof, involving prior identifications.

III

THE OPINION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT IN *NEIL V. BIGGERS* AND *MANSON V. BRATHWAITE.*

The testimony indicated that when witness Swayne was in the custody of the Metropolitan Polica Department of Washington, D. C., he saw the tall, slim black man on the other side of a one-way mirror being held by a District of Columbia police officer while a second District of Columbia police officer standing with Swayne said "look at him good". Such a confrontation is clearly impermissibly suggestive. *See, Foster v. California*, 394 U.S. 440 (1969).

The Court of Special Appeals of Maryland refused to apply the test of *Manson v. Brathwaite*, 432 U.S. 98 (1977) and *Neil v. Biggers*, 409 U.S. 188 (1972) because

Swayne testified that his in-court identification was based upon what he had seen on the night of the shootings, not upon what had transpired in the District of Columbia police station. Petitioner submits that where there has been an impermissibly suggestive pretrial confrontation the trial court must apply the *Neil v. Biggers* analysis despite the testimony of the person making the identification that the confrontation had no effect on his identification. The trial court stated: "This man has made an identification in this courtroom. What happened two years ago has got nothing to do with an in-court identification." (T. 130-131) It is clear beyond per adventure that an impermissibly suggestive confrontation must have had some impact upon the in-court identification. The Court of Special Appeals of Maryland felt it unnecessary to apply that lengthy *Neil v. Biggers* analysis because of witness Swayne's bald statement that his in-court identification was not based upon the out of court confrontation. Petitioner submits that the witness's disclaimer is merely one factor to be considered in the *Neil v. Biggers* analysis and the disclaimer should not have the effect of foreclosing that analysis altogether.

Thus this case squarely presents the issue of whether *Neil v. Biggers* is to be applied when there has been a clearly impermissibly suggestive confrontation but when the witness makes a bald assertion that his in-court identification is not based upon that confrontation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 200

September Term, 1977

ROLAND NEVILLE GODWIN

v.

STATE OF MARYLAND

Moylan,
Menchine,
Lowe,
JJ.

Opinion by Moylan, J.

Filed: November 14, 1977

This case grows out of a macabre series of cold-blooded executions reminiscent of the St. Valentine's Massacre As one of those executioners, the appellant, Roland Neville Godwin, was convicted in the Circuit Court for Prince George's County by a jury, presided over by Judge Jacob S. Levin, of three counts of first-degree murder, four counts of kidnapping and four counts involving the unlawful use of a handgun in the commission of a felony. Upon this appeal, he raises seven contentions:

1) That an extrajudicial identification of him by a codefendant-turned-State's-witness was unconstitutionally received in evidence;

2) That a tainted in-court identification of him by the sole survivor of the executions was unconstitutionally received in evidence;

3) That a tainted extrajudicial photographic identification by a witness was unconstitutionally received in evidence;

4) That he was unduly restricted in his cross-examination of State's witnesses in terms of impeaching their credibility;

5) That the trial court erred when it failed to declare a mistrial because of allegedly improper argument by the State's Attorney;

6) That the trial court committed error when it failed to instruct the jury on the meaning of premeditation; and

7) That the kidnapping convictions should have merged into the felony-murder convictions.

Initially, we will briefly set the factual backdrop of the case. A codefendant and ultimate State's witness, Johnnie Mae Jones, was apparently the victim of a robbery. Instead of complaining to the authorities, she complained to her brother, codefendant Willie Lee

Jones, Jr., and the two of them elected to take the law into their own hands. They were joined in this venture by their two ultimate codefendants, James Richard Person and the appellant.

The four victims were Alvin Jones, Anthony Cunningham and David Dock, all three of whom were executed, and Ronald Swayne, who survived to testify. There were strong intimations in the evidence that the executioneers as a groupa and the victims as a group were part of a narcotics-using culture and that there were some social acquaintanceships flowing between the two groups.

The executions occurred during the pre-dawn hours of October 24, 1975. Ronald Swayne left his home at between 8 and 9 p.m. on October 23 in his own car, a red Cougar. He drove to the residence of his friend (and one of the executed victims) Alvin Jones. He there picked up Jones and another of the ultimate victims, Anthony Cunningham. The threesome drove to an apartment building on C Street in southeast Washington. Swayne blew the horn of his automobile and two individuals came out of the apartment to join them. They were two of the ultimate killers, but danger signs had not as yet reared their heads. The two individuals were codefendant James Richard "Reds" Person, an acquaintance of Swayne, and the appellant, "tall slim black man" whom Swayne had never seen before. Shortly thereafter, David Dock, the remaining ultimate victim, came out of the same apartment and joined "Reds" Person and the appellant in an orange Volkswagen. The orange Volkswagen took off first; Alvin Jones directed Swayne to follow in his red Cougar. Both cars, and all six persons,drove out of the District of Columbia into Seat Pleasant in Prince George's County, Maryland. All six individuals went

into an apartment. They there joined codefendant Willie Lee Jones, Jr. ("Junior"). Swayne testified that he himself was a former drug user and that Alvin Jones was still, as of that night, a heavy drug user. Alvin Jones was in the process of "shooting some narcotic drugs into his arm" when Swayne heard a shot. He looked up and saw that three of the group — "Reds" Person, "Junior" Jones and "the tall slim black man" (the appellant) — all had pistols and were training them upon the other four men. Swayne, along with Cunningham, Dock and Alvin Jones, was told to lie down on the floor. All four of the victims were then covered up with blankets. Swayne heard conversation dealing with the fact that "somebody's sister had been robbed." "Reds" Person and the appellant then placed all four of the victims into a blue Cadillac. Swayne and Cunningham were put on the floor of the back seat. Alvin Jones and Dock were put in the trunk. "Reds" Person and the appellant then drove the Cadillac for between twenty minutes and half an hour to an unknown location.

It was at this unknown location that the identification phase of the "drumhead court-martial" was to take place. Swayne overheard someone say, "Get Junior's sister." About half an hour later, Johnnie Mae Jones (Junior's sister) arrived at the scene. "Reds" Person ordered Cunningham and Swayne to lift up their heads from the floor. Johnnie Mae Jones identified Cunningham as one of the men who had robbed her, thereby sealing his doom. She indicated, on the other hand, that Swayne was not one of her robbers, thereby saving his life. She subsequently was observed to identify Alvin Jones, who lay in the trunk of the blue Cadillac, as one of the robbers. Although Swayne did not testify as to having observed her identify David Dock, who

also lay in the trunk of the blue Cadillac, presumably he was also somehow "deemed guilty".

The testimony of Johnnie Mae Jones essentially corroborated that of Ronald Swayne. She testified that she was picked up by her brother "Junior" Jones at between 1 a.m. and 3 a.m. on the morning of October 24. Her brother drove her to a location in Maryland "on a dark road near a little white church." She there observed two of her brother's friends, "Reds" Person, whom she had known before, and a "tall slim black man," whom she had not known before and whom she knew that night only as "Slim". "Slim" and "Reds" then ordered Cunningham and Swayne out of the back seat of the Cadillac. She testified that she knew that there were other unidentified individuals there because she heard "someone banging on the trunk of the Cadillac." After she had exonerated Ronald Swayne, "Slim" ordered her brother "Junior" to take Swayne and to put him in the trunk of Swayne's own car, the red Cougar. "Slim" then ordered "Junior" Jones to take Johnnie Mae Jones and Swayne home. "Junior" Jones and Johnnie Mae Jones left in the red Cougar, with Swayne in the trunk.

The story at that point is picked up by the testimony of Ronald Swayne. From his position in the trunk of his own red Cougar, he felt the car drive off. When the car stopped, "Junior" Jones released Swayne from the trunk but ordered Swayne to drive at "Junior" Jones direction. As of the moment when Swayne was released from the trunk, Johnnie Mae Jones, presumably now "home", had left the automobile and the presence of Swayne and "Junior" Jones. At Jones direction, Swayne drove the car to an unknown location where they rejoined "Reds" Person and the "tall slim black man" later identified as the appellant. The appellant

ordered "Junior" Jones to put Swayne back in the trunk of Swayne's Cougar. From the trunk, Swayne heard a lot of shooting and then a "big boom." He heard people running back to the car, heard them "jump into the car and pull off." After the car had stopped, Swayne struggled for about five to ten minutes and finally "was able to pop his trunk open." He was the only one upon the scene and he drove his car home.

A disinterested witness, Donald McCain, supplied some of the missing threads. During the early morning hours of October 24, he was staying in a house in Seat Pleasant, Maryland. He looked outside and saw an individual standing by his U-Haul van. Apprehensive about his van, he kept a close lookout and then went outside. He saw parked near his van both a blue Cadillac and a red Cougar. When he walked outside, he observed two individuals, one whom he already knew as James "Reds" Person, who asked McCain for a cigarette. The other individual, later identified photographically as the appellant, he described as "a tall slim black man." After returning to the house where he was staying, he observed these two men walking up the street and one of them appeared to be carrying an object which looked like a gun. From the house, he later heard "about four, five or six shots; a few of these shots sounded like a shotgun and one sounded like a .22 caliber gun." He looked out the window and observed two individuals running back toward the two cars. One of the individuals jumped into the blue Cadillac and the other jumped into the red Cougar and they both drove off.

Alvin Jones was found wounded in a nearby field. He later died at the Prince George's County General Hospital. Found wounded in a nearby creek bed was

Anthony Cunningham, who also later died in the Prince George's County General Hospital. Also found in the creek with a head wound was David Dock, who was pronounced dead upon arrival at the Prince George's County General Hospital.

The appellant was granted a trial severance.[1] Identifications, both judicial and extrajudicial, were made of the appellant by three separate witnesses. Each of those identifications gives rise to an appellate contention.

1. The Extrajudicial Identification by Johnnie Mae Jones

At issue here is the mechanics of the identification as well as the constitutional soundness thereof. Although mechanically the identification involved a somewhat unusual two-step process instead of the more "garden variety" one-step process, we see no impediment. Involved was simply a bit of elementary logic as to which any fact finder should have the requisite competence. Johnnie Mae Jones had never seen the appellant before the night of the killings. At the trial, sixteen months after the fact, she was unable to make a

---

[1]On January 3, 1977, a jury convicted codefendant Willie Lee "Junior" Jones, Jr., of three courts of first-degree murder, four counts of kidnapping and four counts of using a handgun. Jones was sentenced to three life terms, four 30-year terms and four 15-year terms, all sentences to be served consecutively. On October 4, 1977, a Prince George's County jury, presided over by Judge Levin, convicted codefendant James Richard "Reds" Person also of three counts of first-degree murder, four counts of kidnapping and four counts of using a handgun. Person is scheduled to be sentenced on November 7, 1977. On October 10, 1977, the indictment against Johnnie Mae Jones was nol-prossed, in exchange for her testimony as a State's witness.

judicial identification of him in the courtroom. (It is not without significance that the appellant had radically altered in appearance during the intervening sixteen months. Johnnie Mae Jones, however, was unequivocal in her conclusion that the same "Slim" who had been the only member of the three-man "firing squad" not theretofore known to her as of the morning of October 24, 1975, had been the same "Slim" who had stood in the dock with her; her brother, Willie Lee "Junior" Jones, Jr.; and James Richard "Reds" Person at a pretrial hearing on March 30, 1976, five months after the crimes and eleven months before her failure to identify the appellant in the courtroom at the time of the appellant's trial. Her testimony established the major premise of the ultimate identification syllogism: The "Slim" who was at the crime scene is the "Slim" who stood with my brother, "Reds" Person and me in the dock on March 30, 1976. A equals B.

The minor premise was supplied by Edward Garrison Neal, a former Assistant State's Attorney who had been present at the pretrial hearing on March 30, 1976. He stated that four prisoners stood in the dock. They included Johnnie Mae Jones, later turned State's witness; her brother, Willie Lee "Junior" Jones, Jr.; and James Richard "Reds" Person. The fourth person was Roland Neville "Slim" Godwin. Mr. Neal identified the Roland Neville Godwin who was a codefendant at the pretrial hearing on March 30, 1976, as the same Roland Neville Godwin sitting at the trial table as the defendant on February 7, 1977. B equals C.

With the evidentiary establishment of that minor premise, the conclusion was ineluctable:

A equals B.

B equals C.

A equals C.

To wit, the "Slim" whom Johnnie Mae Jones observed at the crime scene is effectively identified as the appellant in this case. We see no flaw whatsoever in this chain of logic.

Granting that what was introduced in this case was an extrajudicial identification of the appellant made by Johnnie Mae Jones on March 30, 1976, the appellant challenges that extrajudicial identification on the grounds that it was impermissibly suggestive. We cannot agree with the appellant that exclusion was called for. We note initially that the police were not guilty of any contrived circumstances for identification purposes. The pretrial hearing of March 30, 1976, was not contemplated as an identification procedure in any way, shape or form. Four defendants were in court to have hearings on motions made by them. They were not there to identify each other. Johnnie Mae Jones herself was still a full-fledged defendant, who had not agreed to become a State's witness. Self-evidently, she was not asked to identify anyone. The recollection that the man she knew as "Slim" at the crime scene had been with her in the prisoner's box at the pretrial hearing was something that came to light only during her testimony at the trial upon the merits. Moreover, the appellant was represented by counsel at the pretrial hearing of March 30, 1976. There was simply no Sixth Amendment violation of the right to the assistance of counsel such as would invoke the per se exclusionary rule of *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967).

When we are looking not a deprivation of the Sixth Amendment's right to counsel but only at so-called impermissive suggestiveness, it is now clear in the light of *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972); *Manson v. Brathwaite*, ___ U.S. ___, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977); *Foster v. State*, 272 Md. 273, 323 A.2d 419; and *Dobson v. State*, 24 Md.App. 644, 335 A.2d 124, that we exclude neither the extrajudicial identification itself nor a judicial identification based upon it except in those cases where there is a "substantial likelihood of irreparable misidentification." In *Manson v. Brathwaite*, the Supreme Court spelled out the factors which militated against a per se exclusionary rule even where there had been present an element of impermissive suggestiveness. In opting rather for the "totality of circumstances" approach, it said, at 53 L.Ed.2d 152-153:

> "The third factor is the effect on the administration of justice. Here the per se approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the per se approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the per se approach but not under the totality approach — cases in which the identification is reliable despite an unnecessarily suggestive identification procedure — reversal is a draconian sanction. Certainly, inflexible rules of exclusion, that may frustrate rather than promote justice, have not been reviewed recently by this Court with unlimited enthusiasm."

The Court's conclusion in *Manson v. Brathwaite* was clear, at 53 L.Ed.2d 154:

> "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers* .... These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

Applying the factors to be considered in this regard as spelled out in *Neil v. Biggers, supra*, we conclude, upon our constitutionally mandated, independent review, that no such likelihood was here present. Johnnie Mae Jones was in close contact with "Slim" for a significant period of time immediately preceding the shootings. "Slim" addressed her at point-blank range and asked her to identify at least several individuals. The incident was such as to rivet serious attention to it. The pretrial confrontation occurred within a few months of the crime. Johnnie Mae Jones appeared certain in her testimony that the man at the crime scene was the same man who stood with her as a codefendant at the pretrial hearing. Under the "totality of circumstances" approach mandated by the due process clause of the Fourteenth Amendment, we perceive no error in the admission of this pretrial identification.

2. The Judicial Identification by Ronald Swayne

The surviving victim, Ronald Swayne, identified the appellant as one of his assailants. The appellant takes umbrage at this judicial identification, claiming it to have been the poisoned produt of a tainted one-on-one showup conducted by the police approximately two days after the crimes. Although we are by no means persuaded that even the extrajudicial identification itself, measured against the standard set out in *Neil v. Biggers*, might not pass muster, for admissibility purposes, in terms of its substantial reliability, it is unnecessary to undertake that lengthy analysis. If the in-court identification is not, indeed, the product of the earlier extrajudicial identification, the suggestiveness *vel non* of that earlier confrontation is immaterial. As we pointed out in *Green v. State*, 35 Md.App. 510, 523, 371 A.2d 1112:

> "For an in-court identification to be suppressed, two things must be shown:
>
> *(1) That the extrajudicial identification procedure was the proximate cause of the ensuing in-court identification.* (Even if there has been a tainted, to wit, impermissibly suggestive, extrajudicial identification procedure, the in-court identification may still be admissible if it is shown to be not the product of the earlier, tainted procedure . . .)."

In this case, the independent source of Ronald Swayne's judicial identification is clear. With the jury out of the room, the following was established unequivocally on direct examination:

> "Q. Is your identification of the tall man in this courtroom today, Mr. Swayne, based upon your observations of him through the entire incident, or was it based upon anything or anyone you saw that Saturday in the District of Columbia police station?
>
> MR. DE PAUL: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Based upon what I seen during that incident."

The defense effort, on cross-examination, to cast doubt upon the independent source of the in-court identification was unavailing:

> "Q. Of course, the help you got from the police helped you out a little bit, didn't it?
>
> A. Not really."

The in-court identification was properly permitted.

3. The Extrajudicial Photographic Identification by Donald McCain

Evidence was introduced establishing that Donald McCain had on approximately March 31, 1976, identified a photograph of the appellant as one of the men he observed on the night of the crimes. Again, the lengthy analysis under *Neil v. Biggers* is unnecessary, because of the utter failure of the appellant to establish, as is his burden, any initial taint in the photographic viewing. There were ten pictures in the photographic array. Though all were not uniform, they were all of young Negro males, some with facial hair and some without. There was nothing to highlight the photograph of the appellant as the one to be picked. There was no suggestion that the police in any way indicated

to McCain that it was the appellant's photograph that should be singled out. Under *Smith and Samuels v. State*, 6 Md.App. 59, 250 A.2d 285, the appellant simply did not carry his initial burden requiring the State to go forward in any regard.

4. The Limitation Upon the Cross-Examination of the State's Witnesses

The appellant sought to cross-examine both Ronald Swayne and Donald McCain as to past criminal conduct or involvement with the police. Upon timely motion by the State, the trial judge ruled that such cross-examination, for purposes of impeaching credibility, must be limited to the showing of actual convictions of crime. With some few exceptions, this is the basic law of Maryland in this regard. *Niemoth v. State*, 160 Md. 544, 557, 154 A. 66; *Hurley v. State*, 6 Md.App. 348, 355, 251 A.2d 241; *Neam v. State*, 14 Md.App. 180, 188, 286 A.2d 540. The trial judge, in these situations, is faced with a delicate balancing. If there is a genuine suggestion or proffer that a witness's involvement with the police is subjecting that witness to a strong motivation to lie, such evidence should be permitted. On the other hand, it must be rigorously guarded against that a witness be diminished in the eyes of a jury simply by a showing that he is "a bad man." It is furthermore to be noted that our law is evenhanded in terms of impeachment and deals equally with witnesses in a civil setting and in a criminal setting and without regard to whether they are witnesses for the prosecution or witnesses for the defense. It will never be permitted that defendants be free to slash away at will at State's witnesses while having the character of their own witnesses more solicitously shielded from attack.

In this case, no proffer indicated that the police had subjected either State's witness to any pressure to testify on behalf of the State. Ronald Swayne was a victim of this crime, not a friend of the defense who was grudgingly turned into a State's witness. Under the circumstances, we see the effort of the defense to establish that Ronald Swayne had participated in several robberies that had been nol-prossed and that Donald McCain was "a dope pusher" and that he was involved with "prostitution rings" and with "stolen cars" as primarily an effort to discredit the two witnesses by showing that they were "bad men." In *Johnson v. State*, 30 Md.App. 512, 517, 352 A.2d 371, Judge Lowe pointed out the cautious limitations that should be placed upon efforts such as those advanced by the appellant in this case:

> "We do not mean to imply that any time a witness testifies against a criminal defendant his entire record of previous arrests becomes relevant to the inquiry. Only where there is some present possibility of coercion should such cross-examination be allowed. If it should appear that the cross-examination is directed simply at casting the witness in the suspicious light that falls upon anyone under formal accusation, the trial judge must not allow it."

We do not feel in this case that the trial judge abused the discretion which is wisely vested in him.

5. Allegedly Prejudicial Remarks in Closing Argument

The argument of the appellant to the effect that the prosecutor made prejudicial remarks in the course of closing argument is simply without factual predicate.

The appellant claims that the prosecutor told the jury that Johnnie Mae Jones had made a photographic identification of the appellant, when in fact she had not made such a photographic identification. We cannot read into the words of the prosecutor any such meaning. In contrasting the ability to make an identification shortly after the crimes with the inability to make an in-court identification sixteen months later, the prosecutor was referring to the changed appearance of the appellant. He said the following:

> "Now, we have two identifications, each of which is supporting the other. Where there might be a weakness in one, it is supported by the other, and vice versa.
>
> But is that all we have? Is there anything more? Yes. She was our first witness. You heard her testimony. She was there. Johnnie Mae Jones.
>
> She saw Roland Godwin as we see him in this picture."

The prosecutor was here referring to a picture which the jury had of the appellant as he looked sixteen months earlier. Although the grammatical structure of the sentence might permit of some ambiguity, we cannot perceive a clear and false statement having been made, and certainly not one calling for a mistrial. For the lack of a factual predicate, the argument falls.

6. Jury Instructions: "Premeditation"

The appellant complains that the trial judge did not give an instruction, or at least an adequate instruction, in terms of defining the element of premeditation. We cannot agree. Recognizing that "[t]here is no necessity

for the court to use the exact language requested," *Nelson v. State*, 5 Md.App. 109, 120, 245 A.2d 606, we think that the trial judge in this case did convey the essential meaning of premeditation. His instruction in this regard was as follows:

> "In Maryland there are two degrees of murder: murder in the first degree and murder in the second. And *the distinction between the two is based on the element of premeditation and deliberation.*
>
> All murder which shall be perpetrated by means of poison or lying in wait or by any kind of willful, deliberate, and premeditated killing shall be murder in the first degree, and in that regard for a homicide to be willful there must be a specific purpose, and there must be a specific design to kill.
>
> *First degree murder, in essence, is killing in cold blood after having calculated the circumstances.* The burden is on the State of Maryland, based on all the facts that you have heard, to show circumstances proving willfulness, deliberation, and premeditation, if you are to find Mr. Godwin guilty of murder in the first degree.
>
> After a full and fair consideration of all the facts in this case, if you are not convinced beyond a reasonable doubt that the State has proven murder in the first degree to your satisfaction, you will find him not guilty of that charge.
>
> If, however, after a full and fair consideration of all the facts in this case you are convinced beyond a reasonable doubt that they have proven all the elements necessary to convict him of murder in the first degree, you are to find him guilty of this charge.

Murder in the second degree is the unlawful killing of a human being with malice, but *without premeditation* and without deliberation. After a full and fair consideration of all the facts and circumstances of this case, you are convinced beyond a reasonable doubt that the State has proven to your satisfaction all the elements necessary to convict him of this offense, you will find him guilty of this offense.

If, however, you are not convinced beyond a reasonable doubt after a full and fair consideration of all the facts and circumstances, you will find him not guilty." (Emphasis supplied)

Following the court's instructions, the exchange that occurred between appellant's counsel and the trial judge is enlightening:

"With regard to your identification of murder in the first definition, Your Honor gave—you said it was killing with malice. You did not use the phrase 'with malice aforethought' as a distinction between—

THE COURT: I don't know what 'aforethought' is."

We applaud both the candor and the correctness of the statement. As of the Twentieth Century at least, the word "aforethought" is absolutely devoid of any meaning whatsoever. As we pointed out in *Evans v. State*, 28 Md.App. 640, 693-695, 349 A.2d 300:

"A similar erosion took place with respect to the word 'aforethought.' In its pristine state, it connoted that the intention to kill had existed some appreciable time before the actual execution of the deed. In connoted the same thing by way of preplanning that premeditation connoted early in

the 19th century (when it entered the law as an attempt to rejuvenate the earlier meaning of 'aforethought') and significantly more by way of preplanning than premeditation connotes today (premeditation having in the meantime suffered a semantic erosion of its own). The word 'aforethought' today is devoid not simply of an ordinary, layman's meaning but of any meaning at all, even as a term of art. As is pointed out by Perkins, *Criminal Law* (2d Ed. 1969), at 34-35:

'Undoubtedly the word 'aforethought' was added to 'malice' in the ancient cases to indicate a design thought out well in advance of the fatal act. But as case after case came before the courts for determination, involving killings under a great variety of circumstances, there came to be less and less emphasis upon the notion of a well-laid plan. And at the present day the only requirement in this regard is that it must not be an *after*thought. 'Killing with malice' is sufficient of itself to negative any possible notion of an afterthought, and apart from the historical background the word 'aforethought' would not be needed.'

To the same effect is Purver, *The Language of Murder*, 14 U.C.L.A.L.Rev. 1306, 1309 (1967):

'Just as the word 'malice' confuses and misleads, the word 'aforethought' likewise muddles thinking:

'The fact that malice aforethought means merely that malice must exist at the same time as the act, in effect makes 'aforethought' meaningless surplusage, since the requirement is satisfied by the presence of malice or 'concurrent' malice rather than an

> antecedent malice. The unimportant character of the adjective 'aforethought' is seen in the fact that in many opinions 'malice' and 'malice aforethought' are used interchangeably and that in many, 'aforethought' is itself omitted.' [Quoting from 1 Wharton, *Criminal Law and Procedure* §243, at 527 (Anderson Ed. 1957)]

Since today 'aforethought' may be 'as instantaneous as successive thoughts of the mind' or 'on the spur of the moment,' the word no longer serves its original function of drawing attention to the duration of the deliberation to kill as the criterion for distinguishing murder from other homicides.'

The use of the now anachronistic language still haunts us, however. As Purver further points out, at 1306:

> 'Precision in the use of legal language is essential, particularly in the law of homicide. In a murder trial the use of a word or turn of a phrase may mark the difference between whether the accused leaves the courtroom free—or sentenced to death.
>
> Yet the phrase 'malice aforethought,' used in defining murder, peers at us like a demon through the dust of more than four hundred years of history, lying in wait to clutter statutes and confuse juries. In examining the historical background of the phrase, one probes the roots of a term which, though withering on the vine, lives on to strangle the penal codes of the several states.'

And, at 1309:

> 'Since 'malice' does not mean 'ill-will' and 'aforethought' does not mean 'beforehand,' jury instructions, though necessary, sound ridiculous.'
>
> The word 'aforethought' is today an absolutely useless appendage on our law. It has over the centuries been utterly drained of any meaning whatsoever. As a word of no utility but with an ever-present potential for confusion (some may innocently think that 'aforethought' means aforethought), it should be struck from the lexicon of our homicide law."

Defense counsel then more appropriately went on to the more pertinent subject of "premeditation":

> "With regard to the instruction on first degree murder, instruction Your Honor gave made no mention of premeditation in the sense of defining premeditation.
>
> You simply said 'premeditation'.
>
> THE COURT: Do you have a definition?
>
> MR. DE PAUL: Pre-planning, pre-conceiving.
>
> THE COURT: I thought I said that."

We are persuaded that looking at the instruction as a totality, the necessary notion that the killing be thought out in advance was communicated to the jury. Particularly was this communicated by the sentence:

> "First degree murder, in essence, is killing in cold blood after having calculated the circumstances."

Even if in some other circumstances, not here pertinent, a more painstaking and precise dissection of the element of premeditation were necessary, this was not such a case. With a fully articulated and well-planned scheme of executions taking place over the

course of several hours, that element of first-degree murder was so clearly and unequivocally established as to leave no room for debate. Realistically, the only question in this case concerned the criminal agency (the identification) of the appellant and not the corpus delicti of the crime. In commenting upon the harmlessness of the even arguable error, we note, moreover, that a common sense, layman's definition of "premeditation" would redound to the benefit of a defendant and the more formal, case-law definition of "premeditation," as a term of art, would work to the benefit of the State. Significant in this regard is the law on premeditation, as discussed in *Chisley v. State*, 202 Md. 87, 106-107, 95 A.2d 577:

> "It is not necessary that deliberation and premeditation shall have been conceived or have existed for any particular length of time before the killing. Their existence must be judged from the facts of the case. *Webb v. State, supra.* The Court of Appeals of New York, in *Leighton v. People*, 88 N.Y. 117, 120, put it in this wise: 'If, therefore, the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder.' The same ruling is made in *People v. Majone*, 91 N.Y. 211, 212: 'Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is."

A layman's understanding of "premeditation" would be something that requires an appreciable length of time; the more sophisticated lore of the case law is that "premeditation," contrary to popular understanding, can occur in a very brief time. A failure to have told the jury this could only have helped the appellant, not hurt him. Error, even if such had been present, would under the circumstances of this case have been palpably harmless. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

7. Felony-Murder and the Question of Merger

The appellant's final contention is that since the conviction for murder in the first degree might have rested upon Article 27, §410, providing, *inter alia*, that all murder committed in the perpetration of a kidnapping shall be murder in the first degree, the underlying felony of kidnapping must, in three of the indictments at least, merge into the ensuing felony-murders. The appellant relies upon *Newton v. State*, 280 Md. 260, 373 A.2d 262. *Newton*, of course, does not stand for such a proposition at all. It rather holds that if the only credible evidence before a fact finder which could justify finding that the highest degree of blameworthiness existed in a homicide case was the fact that one of the felonies spelled out in §§408-409 or 410 was being perpetrated, or attempted, then and only then would the undergirding felony, or its attempt, merge of necessity into the conviction for homicide. If, on the other hand, there was legally sufficient, independent evidence of wilfulness, deliberation and premeditation under Article 27, §407, then the merger would not be compelled. *Newton v. State*, 280 Md. at

273-274. And see *Frye v. State*, Md.App. ___, ___ A.2d ___ (No. 6, September Term, 1977, filed on October 13, 1977).

In the present case, the clear evidence establishing premeditation could not have been more beyond dispute. This was a classic "ambush" or "lying in wait" case. The three murderers set out upon a well-articulated and unequivocal scheme of luring into a trap, kidnapping, transporting to a deserted area, subjecting to an identification process at the hands of Johnnie Mae Jones and then executing all of those persons who had ostensibly robbed her. This calculated and deliberated chain of events stretched out over many miles and several hours. There was no sudden anger or mutual affray. The homicide victims were helpless targets. Under the circumstances of this case, a merger of the convictions is not remotely called for.

JUDGMENTS AFFIRMED;
COSTS TO BE PAID BY
APPELLANT.

MANDATE

Court of Special Appeals of Maryland

No. 200, September Term, 1977

Roland Neville Godwin

vs.

State of Maryland

November 14, 1977: Opinion by Moylan, J.
Judgments affirmed; costs to be paid by appellant.

January 10, 1978: Appellant's Motion for Reconsideration of Decision granted in part. Opinion modified.

February 28, 1978: Mandated issued.

STATEMENT OF COSTS:

In Circuit Court: Prince George's County

Record	25.00
Stenographer's Costs	1,794.00

In Court of Special Appeals:

Filing Record on Appeal	30.00
Printing Brief for Appellant	627.79
Reply Brief	
Portion of Record Extract—Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee	47.50
Portion of Record Extract—Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this twenty-eighth day of February, A.D. 1978.

/s/ _____
Clerk of the Court of Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

March 1, 1978

Joseph A. DePaul, Esquire
James E. Kenkel, Esquire
William C. Brennan, Jr., Esquire
7100 Baltimore Avenue
College Park, Maryland 20740

Re: Roland Neville Godwin v. State of Maryland
No. 200, September Term, 1977

Dear Counsel:

This refers to the Motion for Reconsideration filed in behalf of the appellant, in the captioned case, and you are advised that the Court filed a modified opinion by substituting page 22 and adding page 23 filed yesterday, February 28, 1978. On the same date, a correction notice was sent to you enclosing a substituted page 22 and an additional page 23. The mandate was also issued at the same time, a copy of which was mailed to you; and the appeal record was returned to the Clerk of the lower court forthwith.

Very truly yours,

/s/ _____
Julius A. Romano
Clerk

JAR/nze

cc: Kathleen M. Sweeney, Esquire

COURT OF SPECIAL APPEALS
of Maryland

CORRECTION

February 28, 1978

Please make the following correction in the opinion in the case of

Roland Neville Godwin

vs.

State of Maryland

No. 200, September Term, 1977

Please replace pages of the opinion mailed to you on November 14, 1977, with the attached. The old page 22 should be thrown away and the enclosed pages 22 and 23 should be substituted.

Yours truly, /s/ _____

Under the circumstances of this case, a merger of the convictions is not remotely called for.

The appellant urges that *Frye v. State, supra,* compels us to find a merger of the underlying felony into the murder unless the verdict, or the evidence, showed unmistakably that the murder was of the

premeditated variety rather than of the felony-murder variety. He reads *Frye* overbroadly. *Frye* is, of course, predicated upon *Newton v. State, supra.* The holding of *Newton,* at 373 A.2d 267, was, in this regard, as follows:

> "If . . . the murder conviction is premised upon independent proof of wilfulness, premeditation and deliberation under §407, *or if the evidence is sufficient for a jury to find those elements, the offenses would not merge.*" (Emphasis supplied)

Even more significant than the words of *Newton* themselves is the fact that *Newton* cites as authority for this proposition the case of *Robinson v. State,* 249 Md. 200, 238 A.2d 875. In *Robinson,* as in the present case, there was ample evidence to support either a finding of premeditated murder or a finding of felony murder.[1] The defendant in that case, as the defendant here, was urging that the conviction for the underlying felony (in

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[1]Indeed, there will frequently be situations where a finding of murder in the first degree is predicated not upon the premeditation theory *or* the felony-murder theory as mutually exclusive alternatives but rather upon *both of them together.* An over-rigidification of the decisional process could work untold mischief. Posit a hypothetical situation. All twelve jurors are unanimously agreed that a defendant is guilty of murder in the first degree. In terms of how they arrive at their decision, however, there is no such agreement. Three are adamantly convinced that there has been premeditation but no felony. Three others are adamantly convinced that there has been a felony-murder but no premeditation. Three others are equally stubborn in their insistence that the first-degree verdict is supported by both premeditation and felony-murder. Three others are absolutely persuaded that there is guilt of murder in the first degree but are in a state of balance as to whether it is because of the premeditation principle or the felony-murder principle. Is this jury hung? Is the declaration of a mistrial called for? Obviously not! Why? Because it would be absurd!

that case assault with intent to rape) must merge into the murder conviction where there is a possibility that the first-degree murder conviction was based upon the felony-murder theory. The Court of Appeals rejected that contention, saying at 249 Md. 209:

> "Since there is an abundance of evidence to support a verdict of premeditated murder under §407 of Article 27 we must reject appellant's presumption that the jury found him guilty of a felony murder under §410.
>
> It is entirely possible, and we think it more than likely, that the jury's verdict reflects a finding that the murder of Florence was premeditated."

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.

APPENDIX B

ROLAND NEVILLE

v.

STATE OF MARYLAND

ROLAND NEVILLE GODWIN

IN THE COURT OF APPEALS OF MARYLAND
Petition Docket No. 19
September Term, 1978
(No. 200—September Term, 1977
Court of Special Appeal)

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals and the answer filed thereto in the above entitled case, it is this 21st day of November, 1978,

ORDERED, by the Court of Appeals of Maryland, that the writ of certiorari to the Court of Special Appeals shall issue and that review shall be limited solely to Question V concerning the merger of the underlying felony convictions into the murder convictions; and it is further

ORDERED that said case shall be transferred to the regular docket as No. 88, September Term, 1978.

/s/ Robert C. Murphy
Chief Judge

ROLAND NEVILLE

v.

STATE OF MARYLAND

ROLAND NEVILLE GODWIN

IN THE
COURT OF APPEALS
OF
MARYLAND
Petition Docket No. 19
September Term, 1978
(No. 200—September Term, 1977
Court of Special Appeal)

WRIT OF CERTIORARI

TO THE HONORABLE THE JUDGES
OF THE COURT OF SPECIAL
APPEALS OF MARYLAND:

WHEREAS, *Roland Neville Godwin v. State of Maryland*, No. 200, September Term, 1977 was pending before your Court, and the Court of Appeals of Maryland is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED to cause them to be sent without delay to the Court of Appeals of Maryland, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS, the Chief Judge of the Court of Appeals of Maryland, this 21st day of November, 1978.

/s/ James H. Norris, Jr.
Clerk
Court of Appeals of Maryland

IN THE
COURT OF APPEALS OF MARYLAND

No. 88

September Term, 1978

ROLAND NEVILLE GODWIN

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Eldridge
Orth
Cole,
JJ.

ORDER OF COURT

Filed: November 21, 1978

ROLAND NEVILLE GODWIN

v.

STATE OF MARYLAND

IN THE COURT OF APPEALS OF MARYLAND

No. 88

September Term, 1978

ORDER

It is this 21st day of November, 1978

ORDERED, by the Court of Appeals of Maryland, that the judgment of the Court of Special Appeals in the above entitled case be, and it is hereby, vacated and the case is remanded to the Court of Special Appeals for the entry of a new judgment consistent with the opinion of this Court in *State v. Eugene Shaw Frye* and *Willie Lee Jones, Jr. v. State*, Nos. 133 and 173, September Term, 1977 decided November 16, 1978; and it is further

ORDERED that the costs are to be paid by Prince George's County.

/s/ Robert C. Murphy

Chief Judge

ROLAND NEVILLE GODWIN

v.

STATE OF MARYLAND

IN THE COURT OF APPEALS OF MARYLAND

No. 88

September Term, 1978

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of *Roland Neville Godwin v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the fourteenth day of November, 1977 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated November 21, 1978; and

WHEREAS in the September Term, 1978 the said cause was submitted to the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 21, 1978 by this Court that the judgment of the Court of Special Appeals be vacated and case remanded to your Court for entry of a new judgment consistent with the opinion of this Court in *State v. Eugene Shaw Frye* and *Willie*

Lee Jones, Jr. v. State, Nos. 133 and 173, September Term, 1977, decided November 16, 1978; costs to be paid by Prince George's County.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this twenty-first day of November, 1978.

/s/ /s/

Clerk
Court of Appeals of Maryland

Costs:

Petition filing fee	$20.00
Record	25.00

APPENDIX C

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 200
(ON REMAND)

September Term, 1977

ROLAND NEVILLE GODWIN

v.

STATE OF MARYLAND

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*Gilbert, C.J.
Moylan,
Lowe,
JJ.

Opinion by Moylan, J.

Filed: January 16, 1979

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*Judge W. Albert Menchine who participated in the original opinion retired on December 31, 1977.

The appellant, Roland Neville Godwin, was convicted by a Prince George's County jury, presided over by Judge Jacob S. Levin, of three counts of first-degree murder, four counts of kidnapping and four counts involving the unlawful use of a handgun in the commission of a crime of violence. He appealed initially to this Court, raising seven separate contentions. We rejected all of those contentions and affirmed the convictions in *Godwin v. State*, 38 Md.App. 716. The Court of Appeals granted certiorari to consider one of those contentions—that three of the kidnapping convictions should have merged into the three convictions of first degree murder. On November 21, 1978, the Court of Appeals passed an order vacating our judgment in this case and remanding it to us "for the entry of a new judgment consistent with the opinion of [that] Court in *State v. Eugene Shaw Frye* and *Willie Lee Jones, Jr. v. State*, Nos. 133 and 173, September Term, 1977, decided November 16, 1978." It will reduce the clutter to clear away the convictions which are not affected by the order of the Court of Appeals.

The appellant, along with two codefendants, was convicted of gangland-style kidnappings and executions directed initially at four victims and fully consummated with respect to three of those victims. With respect to each of the three victims who was ultimately executed—Alvin Jones, Anthony Cunningham and David Dock—convictions were obtained for murder in the first degree, kidnapping and the use of a handgun in the commission of a crime of violence. With respect to the intended victim who was ultimately permitted to go free by his captors—Ronald Swayne—convictions were obtained simply for kidnapping and

the use of a handgun in the commission of a crime of violence. Those two convictions, wherein the victim was Ronald Swayne, are unaffected by anything in the Court of Appeals' order and as to them, the judgments below remain affirmed.

As in the *Jones* case, *supra*, a remand is in order with the State having the option of 10 retrying the aappellant on the three murders and related kidnappings in an effort to obtain consecutive sentences or 2) allowing the kidnapping convictions to be vacated and deemed merged into the respective murder convictions. If the State should decide that it is content with "a bird in hand," our direction to the court below is to vacate the convictions and sentences on those three kidnapping charges. The convictions and the sentences for both the murders and the handgun uses will remain unaffected by the remand.

A word is in order about leaving the convictions and sentences for the handgun offenses undisturbed. In the first place, the legal sufficiency of the evidence to support the handgun convictions is not disputed. The Court of Appeals' order does not disturb one whit the findings upon the merits that three murders (crimes of violence) were committed with handguns and that three kidnappings (also crimes of violence) were also committed with handguns. The undisturbed convictions for murder alone serve as ample predicates for the handgun convictions[1]—regardless of the fate of the kidnapping convictions. In the second place, the crime

[1]A conviction for the use of a handgun in the commission of a crime of violence may stand upon its own legs, of course, even in the face of an acquittal on the merits for the actual "crime of violence" itself. *Ford v. State*, 274 Md. 546.

of using a handgun in the commission of a crime of violence contains an element—the use of a handgun—which is not a required element of either murder or kidnapping. They, in turn, each require obvious elements not required for the handgun convictions. The handgun convictions are not, therefore, lesser included offenses for purposes of mandatory merger. *Couplin v. State*, 37 Md. App. 567; *Cates v. State*, 21 Md. App. 363; *Bremer v. State*, 18 Md. App. 291; cf. *Dillon v. State*, 277 Md. 571. They do not merge directly into the murder convictions. Neither do they merge into the kidnapping convictions so as to link their destinies inexorably together.[2]

[2]Even if the handgun charges were tied exclusively to the kidnappings as their predicates and even if *Ford v. State, infra*, did not permit the handgun charges to stand independent of the fate of the kidnapping charges, sound reasoning still would not dictate vacating them in a case such as this. In a merger situation such as that mandated by *Newton v. State, supra*, the convictions for the underlying felonies are vacated not because, upon the merits, those felonies *did not* occur but for the very opposite reason that those felonies *did* occur and are, as lesser included offenses, subsumed into the greater offenses so as to avoid double punishment. Even if consistency between verdicts were demanded, therefore, the factual predicate for the handgun offense is not wiped out where the crime of violence is merged into a greater offense, in contrast to the very different situation where the crime of violence has been found, upon the merits, not to have occurred. We look to the substance of what happens and not the mere form. Every vacating of a kidnapping conviction is not the same as every other in terms of its significance and impact. To prove a kidnapping upon the merits but to have it merged into a greater inclusive offense so as to avoid multiple punishment is a far cry from failing to prove the kidnapping upon the merits. The only reason the underlying felony merges into the felony-murder is because it has no element not contained in that particular form of murder. The use of the handgun in the commission of the merged felony, by way of contrast, does have an independent element and does not so merge.

We now turn to the possibilities that may occur in the event the State exercises its retrial option to push for consecutive sentences.[3] Even in this event, the vacating of convictions and the ensuing retrial would be with respect to the three murder charges and the three related kidnapping charges. For all of the reasons discussed above, there is no necessity for a retrial as to the three handgun charges and these convictions may stand undisturbed, whatever course the State elects to take with regard to the murders and the kidnappings. It is clear, under *Ford v. State, supra*, that the crime of using a handgun in the commission of a crime of violence is not a "lesser included offense" within nor the "same offense" as the related crime of violence and a conviction for the one may stand unaffected by the fate of the other. There is no multiple punishment problem and no former jeopardy problem (autrefois convict variety) because the handgun offense and the "crime of violence" in which the handgun is used are not "the same offense" within the contemplation of double jeopardy law. *Newton v. State*, 280 Md. 260, 373 A.2d 262 (1977); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

With respect to the three murder charges and the three related kidnapping charges, we remand them to the Circuit Court for Prince George's County for

[3]In view of the stark realities of parole consideration, wherein ostensibly lengthy sentences rapidly pass a point of diminishing returns, the strategic wisdom of opting for some nominal victory in terms of sentence at the risk of Pyrrhic victory in terms of mind-boggling confusion and opportunity for error as illustrated by this case and *Jones* and *Frye* would appear highly questionable. The decision, however, is in the unfettered discretion of the State's Attorney's Office.

further proceedings. The State may, if it is so inclined, elect to retry the appellant for both the murders and the underlying kidnappings. In such event, the jury should be instructed in accordance with *State v. Frye and Jones v. State*, ___ Md. ___, 393 A.2d 1372 (1978) and as fully explained in *Frye v. State*, 37 Md.App. 476, 378 A.2d 155 (1977). If, after a reasonable time, the State fails to elect a new trial, the judgments on the three underlying kidnapping counts should be vacated and the judgments of guilty on the three murder counts should be enrolled.

JUDGMENTS AS TO COUNTS 22 AND 25 (CHARGING KIDNAPPING AND THE USE OF A HANDGUN WITH RESPECT TO THE VICTIM SWAYNE) AFFIRMED; JUDGMENTS AS TO COUNTS 7, 14 AND 21 (THE HANDGUN COUNTS WITH RESPECT TO THE OTHER THREE VICTIMS) AFFFIRMED; JUDGMENTS AS TO COUNTS 4, 11 AND 18 (CHARGING THE THREE RELATED KIDNAPPINGS) VACATED AND REMANDED FOR FURTHER PROCEEDINGS; COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

APPENDIX D

IN THE COURT OF APPEALS OF MARYLAND

No. 133 and No. 173

September Term, 1977

No. 133

STATE OF MARYLAND
v.
EUGENE SHAW FRYE

* * *

No. 173

WILLIE LEE JONES, JR.
v.
STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
*Levine
Eldridge
Orth
Cole,
JJ.

Opinion by Eldridge, J.
Murphy, C.J., concurs in the judgments.

Filed: November 16, 1978

*Levine, J., participated in the hearing of the cases and in the conference in regard to the decisions but died prior to the adoption of the opinion by the Court.

This Court in *Newton v. State*, 280 Md. 260, 373 A.2d 262 (1977), held that when a defendant is charged with both murder and a felony arising from the same transaction, and is convicted of murder based upon the felony murder doctrine, the underlying felony merges into the murder conviction. The two cases now before us involve the application of the *Newton* holding under circumstances where we do not know whether the jury's finding or murder was premised upon the felony murder doctrine.

I.

Before turning to the facts of the instant case, it would be useful to briefly review the applicable legal background. It is provided in Maryland Code (1957, 1976 Repl. Vol.), Art. 27, §§407-410, that certain types of murder shall be murder in the first degree. Under Art. 27, §411, all murder not provided for in §§407-410 is murder in the second degree. Section 407 states that "[a]ll murder which shall be perpetrated . . . by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree." To establish first degree murder under this section it must be proven that the homicide was wilful, deliberate and premeditated, which also establishes the element of malice. *Newton v. State, supra*, 280 Md. at 268; *Dorsey v. State*, 278 Md. 221, 362 A.2d 642 (1976); *Gladden v. State*, 273 Md. 383, 330 A.2d 176 (1974). Under §410, however, murder committed in the perpetration of certain enumerated felonies, including robbery and kidnapping, is first degree murde. To prove first degree murder under §410, there is no need to prove wilfulness, deliberation and premeditation as would be

required by §407. Instead, to secure a first degree murder conviction under §410, the State must prove only the elements of the underlying felony and the death occurring in the perpetration of the felony. *Newton v. State, supra*, 280 Md. at 269; *Veney v. State*, 251 Md. 159, 174, 246 A.2d 608 (1968), *cert. denied*, 394 U.S. 948, 89 S.Ct. 1284, 22 L.Ed.2d 482 (1969); *Stansbury v. State*, 218 Md. 255, 260, 146 A.2d 17 (1958).

In *Newton v. State, supra*, the defendant was charged with murder of a taxicab driver and attempted armed robbery of the driver, both charges growing out of the same transaction. The evidence established that the defendant Newton and a companion, after borrowing a revolver, hailed a taxicab. After proceeding one block, the companion told the driver that it was a "stick-up" and that he should stop the cab. The driver complied and raised his hands; nevertheless he was shot and killed. The testimony was in sharp conflict as to which one did the shooting. Newton testified that it was the companion who shot the driver, and the companion testified that it was Newton. Newton had elected a non-jury trial, and at the end of the trial, the court found him guilty of first degree murder expressly on the basis that the killing was "in the course of the perpetration of an attempted robbery." In addition, the court found Newton guilty on the attempted armed robbery charge, and sentences were imposed on both convictions. After the Court of Special Appeals upheld both convictions and sentences, we granted a writ of certiorari to consider Newton's contention that separate sentences for both felony murder and the underlying felony constituted double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

We initially stated in *Newton* that whether a separate sentence for attempted robbery violated the Double Jeopardy Clause depended upon "whether felony murder and the underlying felony upon which the murder conviction is founded are to be deemed the same offense under federal double jeopardy principles." 280 Md. at 265. We then pointed out, *id.* at 265-266, as we have on several other occasions recently,[1] that the federal standard for determining whether two offenses arising from the same transaction are to be deemed the same offense for double jeopardy purposes is the so-called "required evidence" test as set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and *Gavieres v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911), and originally adopted from *Morey v. Commonwealth*, 108 Mass. 433 (1871). This was recently reiterated by the Supreme Court in *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977):

> "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932):
>
> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . .'
>
> This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .' *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975)."

And, as explained in *Thomas v. State*, 277 Md. 257, 267, 353 A.2d 240 (1976):

> "The required evidence is that which is minimally necessary to secure a conviction for each statutory offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes."

Applying the required evidence test in *Newton*, we held that felony murder and the underlying felony must be treated as one offense for double jeopardy purposes. After discussing the requirements for proving first degree murder under the felony murder doctrine (Art. 27, §410), we reasoned in *Newton* (280 Md. at 269):

> "Therefore, to secure a conviction for first degree murder under the felony murder doctrine, the State is required to prove the underlying felony and the death occurring in the perpetration of the felony. The felony is an essential ingredient of the murder conviction. The only additional fact

[1] Johnson v. State, 283 Md. 196, 388 A.2d 926 (1978); Bynum v. State, 277 Md. 703, 706, 357 A.2d 339, *cert. denied*, 429 U.S. 899, 97 S.Ct. 264, 50 L.Ed.2d 183 (1976); Cousins v. State, 277 Md. 383, 388-389, 354 A.2d 825, *cert. denied*, 429 U.S. 1027, 97 S.Ct. 652, 50 L.Ed.2d 631 (1976); Thomas v. State, 277 Md. 257, 267, 353 A.2d 240 (1976).

necessary to secure the first degree murder conviction, which is not necessary to secure a conviction for the underlying felony, is proof of the death. The evidence required to secure a first degree murder conviction is, absent the proof of death, the same evidence required to establish the underlying felony. Therefore, as only one offense requires proof of a fact which the other does not, under the required evidence test the underlying felony and the murder [constitute the same offense for double jeopardy purposes and] merge."

Two months after our decision in *Newton*, the Supreme Court reached the same conclusion in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), namely that felony murder and the underlying felony are to be deemed the same offense under the Double Jeopardy Clause of the Fifth Amendment. In *Harris*, the defendant and an accomplice were engaged in the robbery of a grocery store when the accomplice shot and killed a store clerk. The defendant Harris was convicted of murder, based upon the felony murder doctrine, in an Oklahoma court. Harris was then convicted and sentenced on a charge of robbery with firearms, and the Oklahoma appellate court affirmed. *Harris v. State*, 555 P.2d 76 (Okla. Crim.App. 1976). The United States Supreme Court reversed the robbery conviction, saying (433 U.S. at 682):

"When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser

crime after conviction of the greater one."[2]

See also Brown v. Ohio, supra, 432 U.S. at 168.

Although we held in *Newton* that felony murder and the underlying felony are to be considered one offense for purposes of multiple punishment, and therefore the underlying felony would merge into the felony murder conviction, we also emphasized that if a first degree murder conviction is premised upon independent proof of wilfulness, premeditation and deliberation under Art. 27, §407, then the murder, even though committed in the course of a felony, would not be deemed the same offense as the felony, and there would be no merger. "Each offense would then require proof of facts which the other did not, and convictions on both would be proper." *Newton* v. State, supra, 280 Md. at 269. The two cases at bar, to which we now turn, involve this reservation.

II.

The defendant in one of the instant cases, Eugene Shaw Frye, was charged in two separate indictments with four violations of the criminal law which are here

[2]At the time this Court decided Newton v. State, 280 Md. 373 A.2d 262 (1977), there was a split in decisions among state and lower federal courts as to whether felony murder and the underlying felony were to be treated as the same offense for double jeopardy purposes. Interestingly, the decision of the Oklahoma Court of Criminal Appeals in Harris v. State, 555 P.2d 76 (Okla.Crim.App. 1976), was cited by both themajority and dissenting opinions in *Newton* as representative of a line of cases permitting conviction and sentencing of a defendant on both felony murder and the underlying felony. Newton v. State, *supra*, 280 Md. at 270, 275 n. 1. The *Harris* decision, as discussed in the text, was subsequently reversed by the Supreme Court.

relevant. In one indictment, he was charged in the first count with murder and in the second count with using a handgun in the commission of a crime of violence (*i.e.*, the murder). In the other indictment, he was accused in one count of robbery with a dangerous and deadly weapon and in another count of using a handgun in the commission of a crime of violence (*i.e.*, the robbery). He was brought to trial, before a jury, in the Criminal Court of Baltimore. With respect to the murder count, the State proceeded both on the theory of wilful, deliberate and premeditated murder and on the theory of felony murder. The evidence presented by the State tended to establish that on November 29, 1975, Frye entered a grocery store and ordered some luncheon meat. As the proprietor was slicing the meat, Frye went behind the counter and drew a handgun on him. After a brief affray, Frye shot the shopkeeper, removed money from the cash register, and proceeded to flee. This account of the shooting was directly contradicted by Frye, who claimed that the gun fell out of his pocket and accidentally discharged.

At the conclusion of Frye's trial, the jury was instructed on felony murder, on wilful, deliberate and premediated murder, and on robbery with a dangerous and deadly weapon. No instruction was given or requested telling the jury that if it decided that Frye was guilty of murder, it should then state whether such verdict rested upon the theory of felony murder or upon a finding a wilful, deliberate and premeditated murder. Moreover, no alternative instruction was given or requested such as advising the jury that, if it based a murder verdict upon the felony murder doctrine, it should not then consider the underlying

robbery charge or the handgun charge associated with the robbery charge. The jury found the defendant guilty of first degree murder and robbery with a dangerous and deadly weapon. Due to the general verdict of first degree and the lack of direction in the instructions, there is basis to determine whether the jury's finding of murder was grounded upon wilful, deliberate and premeditated murder, or upon a felony murder. Frye was also found guilty of both counts of unlawful use of a handgun in the commission of a felony. On the murder conviction, Frye was sentenced to life imprisonment, and he was given a concurrent five year term on the associated handgun count. With regard to the robbery and its related handgun conviction, he received sentences of 20 years and 5 years, respectively, to run concurrently with the sentences on the murder conviction.[3]

Frye took an appeal to the Court of Special Appeals, arguing that *Newton* v. State, supra, required merger of the underlying felony into the murder conviction. Although the issue was not raised at the trial level, the Court of Special Appeals invoked its discretionary authority under Maryland Rule 1085 to consider the matter. The Court of Special Appeals then vacated the judgments on the felony count and the associated handgun count, stating (*Frye v. State*, 37 Md.App. 476, 480, 378 A.2d 155 (1977)):

> "The trial judge, when confronted with a murder case involving a 'felony murder,' Md. Ann. Code art. 27, §410, should instruct the jury that they are

[3]As to the Maryland rule concerning the reviewability of concurrent sentences, see the discussion in Newton v. State, *supra*, 280 Md. at 265.

to indicate by their verdict whether, from all the evidence, they have found the accused guilty of a felony murder under §410, or they have found the requisite intent of 'wilfulness, premeditation and deliberation' independent of the underlying felony so that the accused is guilty of a §407 murder. The jury should also be instructed that they are to render a verdict on each of the other counts of the indictment be the murder a violation of §407 or §410. When the jury finds the accused guilty of a §410 murder, the underlying felony should be deemed to be merged into the murder and a separate sentence should not be imposed for the underlying felony violation. On the other hand, if the jury returns a verdict of guilty of murder under §407 and the underlying felony, the trial judge is at liberty to impose sentences on both the murder and the underlying felony.

"As we have indicated, in the absence of such jury instructions and in light of the resultant verdicts, we are unable to state which of the permissible inferences the jury drew in arriving at its verdict in the case *sub judice*. We resolve the doubt in favor of the appellant, and we vacate the judgments entered on the robbery with a deadly weapon and the related handgun charge."

We granted the State's petition for a writ of certiorari, limited to the question whether the Court of Special Appeals had misapplied our decision in *Newton* v. State, supra.[4]

[4]A second matter presented by the State's petition was that we should reconsider our holding in *Newton*. However, and particularly in light of the Supreme Court's decision in Harris v. Oklahoma, *supra*, our order granting certiorari excluded this issue.

The defendant in the other case now before us, Willie Lee Jones, Jr., was charged by the State with three counts of murder, four counts of kidnapping, and four counts of unlawful use of a handgun in the commission of a felony. The evidence presented by the prosecution at Jones' jury trial showed that he, along with two other men, kidnapped four individuals at gunpoint and took them to a wooded area in Prince George's County. The reason for the abductions was that the four victims were suspected of having stolen cocaine belonging to Jones's sister. After purporting to ascertain that three of the kidnapped victims were involved in the theft, these three were shot and killed.

At the close of Jones's trial, the jury was instructed on felony murder, on wilful, deliberate and premeditated murder, on kidnapping, and on the unlawful use of a handgun in the commission of a felony. As in *Frye*, the court was not asked to and did not of its own accord give the jury any instructions designed to reveal the basis of a murder verdict. The State expressly argued to the jury that Jones was guilty of wilful, deliberate and premeditated murder, and, alternatively, that even if he did not participate in wilful, deliberate and premeditated killings, he would be guilty under the felony murder theory. The jury found Jones guilty on three counts of first degree murder, four counts of kidnapping, and all four handgun counts. Again, as in the *Frye* case, the jury's first degree murder verdict affords no foundation for this Court to determine whether the conviction was based on felony murder or on wilful, deliberate and premeditated murder. Jones was sentenced to life imprisonment on each of the murder convictions, 30 years on each of the four kidnapping

convictions and 15 years on each of the four handgun convictions. All sentences were imposed to run concurrently.

Jones took an appeal to the Court of Special Appeals, arguing, among other things, that under *Newton* v. State, supra, the kidnapping and murder convictions merged. The Court of Special Appeals, as it did in its *Frye* decision two months earlier, considered the question on its merits despite the defendant's failure to raise the issue at trial. On the merits, however, the Court of Special Appeals reached a conclusion exactly opposite from its earlier conclusion in *Frye*, and it affirmed the felony and associated handgun convictions, saying (*Jones v. State*, 38 Md.App. 288, 304, 380 A.2d 659 (1977)):

> ' "The appellant's final contention is that since the conviction for murder in the first degree might have rested upon Article 27, §410, providing, *inter alia*, that all murder committed in the perpetration of a kidnapping shall be murder in the first degree, the underlying felony of kidnapping must, in three of the indictments at least, merge into the ensuing felony-murders. The appellant relies upon *Newton* v. State, 280 Md. 260, 373 A.2d 262. *Newton*, of course, does not stand for such a proposition at all. It rather holds that if the only credible evidence before a fact finder which could justify finding that the highest degree of blameworthiness existed in a homicide case was the fact that one of the felonies spelled out in §§408-409 or 410 was being perpetrated, or attempted, then and only then would the undergirding felony, or its attempt, merge of necessity into the conviction for homicide. If, on the other hand, there was legally sufficient independent evidence of wilfulness, deliberation and premeditation under Article 27, §407, then the merger would not be compelled.' "[5]

The defendant Jones then petitioned this Court for a writ of certiorari, raising solely the matter of the proper application of *Newton* to the underlying felony and associated handgun convictions. We granted the petition and heard the case along with *Frye*.

III.

The State's argument in these two cases is the same as the position adopted by the Court of Special Appeals in *Jones*. The State contends that under the *Newton* holding, an underlying felony would merge into a murder conviction only if the sole evidentiary basis for the murder verdict is the felony murder doctrine, but that if there is any legally sufficient evidence of wilfulness, deliberation and premeditation, there would be no merger. This interpretation of our decision in *Newton* is patently incorrect. The facts of *Newton* itself show the State and the Court of Special Appeals in *Jones* to be in error. *Newton* was not a case where the only credible evidence justifying a murder finding was

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[5]The Court of Special Appeals in *Jones* was actually quoting from its opinion in Godwin v. State, 38 Md.App. 716, 736, 382 A.2d 596 (1977). A petition for a writ of certiorari was filed in Godwin on March 15, 1978, and is presently pending. *Godwin* was decided one month after *Frye* and one month prior to *Jones*. The *Godwin* case arose out of the same transaction as the *Jones* case, Godwin being an accomplice of Jones in the alleged kidnapping and murder. It was the opinion in the *Godwin* case which initially created the conflict within the Court of Special Appeals.

evidence establishing felony murder. The testimony of Newton's companion, contradicting Newton's version of the shooting and stating that Newton himself intentionally and deliberately shot the taxicab driver, was clearly legally sufficient evidence of wilfulness, premeditation and deliberation.[6]

The reason for our deciding in *Newton* that the underlying felony merged into the murder conviction was, therefore, not a lack of evidence showing wilfulness, premeditation and deliberation. It was because the trier of facts *based* the verdict on felony murder instead of finding wilful, deliberate and premeditated murder under Art. 27, §407. Where the same transaction gives rise to both murder and felony charges, and where the murder charge is submitted to the trier of facts both on the theory of felony murder and on the theory of wilful, deliberate and premeditated murder, *Newton* teaches that it is the basis for the murder verdict which controls the merger issue.

The effect of the position taken by the State and by the Court of Special Appeals in *Jones*, is to assume that the jury rested its verdict on a finding of wilful, deliberate and premeditated killing instead of on the felony murder theory in every case where there is any evidence of wilfulness, deliberation and premeditation. But in cases like *Newton*, *Frye* and *Jones*, there would be no justification for such an assumption. If *Newton* had been a jury trial, and if the jury had believed the testimony of the defendant Newton that

[6]This testimony was adequately corroborated, and thus the Maryland rule requiring corroboration of an accomplice's testimony was satisfied.

the killing of the taxicab driver was solely the work of his companion, the basis of the jury's murder verdict would have been felony murder. In the *Frye* case, if the jury believed the defendant's account that the gun fell out of his pocket and accidentally discharged, the murder verdict would not rest on the evidence of wilfulness, deliberation and premeditation. The prosecuting attorney in *Jones* extensively argued the felony murder theory to the jury as an alternative basis of conviction if the jury found an absence of wilfulness, deliberation and premeditation. To infer in these cases that the basis for the first degree murder verdict was a finding of wilfulness, deliberation and premeditation, would be sheer speculation.

The convictions and sentences for the underlying felonies in the present cases are supportable if the juries found wilful, deliberate and premeditated killings but are not supportable if the murder verdicts rested upon the felony murder theory, and it is impossible to tell which basis was chosen by the juries in rendering the verdicts on the murder counts. The Supreme Court, in *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), made it clear that the doubtful verdict in such a situation cannot stand:

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the vedict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Stromberg v. California*, 283 U.S. 359, 367-368; *Williams v. North Carolina*, 317 U.S. 287, 291-292; *Cramer v. United States*, 325 U.S. 1, 36, n 45."

See also Leary v. United States, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

Where there is more than one ground for a verdict on a criminal charge, but where the ramifications of a guilty verdict on that charge will be different depending upon the ground chosen by the jury, the obvious way to deal with the situation is, as indicated by the court below in *Frye*, to give the jury adequate advisory instructions. *See United States v. Quicksey*, 525 F.2d 337 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976); *Brown v. United States*, 299 F.2d 438 (D.C. Cir. 1962). In cases like the present ones, the court should, in advising the jurors as to the form of their verdict, give them appropriate instructions so that the basis of a first degree murder verdict will be revealed.[7]

In the normal situation where a defendant is charged both with a greater crime and with a lesser included offense, and where a guilty verdict with regard to the greater crime will result in a merger, the proper method of instructing the jurors is to advise them that if the verdict on the count charging the greater crime is guilty, then they should not consider the count charging the lesser crime. However, the Court of

[7]In the present cases, the State relies upon Robinson v. State, 249 Md. 200, 238 A.2d 875, *cert. denied*, 393 U.S. 928, 89 S.Ct. 259, 21 L.Ed.2d 265 (1968). However, no question concerning jury instructions to determine whether a murder verdict is grounded on felony murder or wilful, deliberate and premeditated murder, was raised or discussed in *Robinson*. Moreover, *Robinson* was decided before the Supreme Court in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), held that the Fifth Amendment's Double Jeopardy Clause was, by virtue of the Fourteenth Amendment, applicable to state proceedings. Thus, to the extent that there may be anything in the *Robinson* opinion inconsistent with our opinion in *Newton* or our opinion in the instant case, the latter two opinions obviously control.

Special Appeals in *Frye* suggested a somewhat different type of instruction. It said that the trial judge should instruct the jury to indicate whether the basis for a murder verdict is felony murder or is wilful, deliberate and premeditated murder, but that the judge should tell the jury to render a verdict on the felony count in any event. Then, if the basis of the murder verdict is felony murder, the Court of Special Appeals stated that the trial judge should not impose a sentence on the felony count. Because of the peculiar nature of the problem presented in cases like *Frye* and *Jones*, where one basis for a guilty verdict on the murder count will preclude a sentence on the felony count, but another basis for a guilty verdict on the same murder count will not have this effect, we agree with the type of instruction suggested by the Court of Special Appeals.

The Court of Special Appeals in *Frye*, because of the ambiguity in the jury's verdict due to the absence of adequate instructions, "resolve[d] the doubt in favor of the appellant, and . . . vacate[d] the judgments entered on the robbery with a deadly weapon and the related handgun charge." 37 Md.App. at 480. Although we agree with this result in *Frye* because of an unusual aspect of the appeal in that case, we believe that the relief to be granted in *Jones* should be somewhat different.

If there had been appropriate jury instructions in *Jones*, the jury might have based its murder verdicts on a finding of wilful, deliberate and premeditated homicide. It would have considered the underlying felony charges and the associated handgun charges, and guilty verdicts on those felony counts could properly have resulted in sentences. It was not in any

manner the State's fault that such instructions were not given. Under these circumstances, we believe that the State may, if it is so inclined, elect to re-try Jones on the murder, underlying felony and associated handgun charges. In such event, the jury should be instructed as indicated in this opinion. But if, after a reasonable period of time, the State fails to elect a new trial in the *Jones* case, the judgments on the three underlying felony and related handgun counts should be vacated.

However, the State may not have such an election in the *Frye* case because the defendant Frye, unlike Jones, did not take an appeal from the murder conviction. For the State to try him again for murder would violate the prohibition against double jeopardy. *Benton v. Maryland*, 395 U.S. 784, 796-797, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *Green v. United States*, 355 U.S. 184, 188-194, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

JUDGMENT IN NO. 133 AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

JUDGMENT IN NO. 173 REVERSED, AND CASE REMANDED TO THE COURT OF SPECIAL APPEALS FOR THE ENTRY OF A NEW JUDGMENT NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

IN THE
COURT OF APPEALS OF MARYLAND

No. 133 and No. 173

September Term, 1977

No. 133

STATE OF MARYLAND
v.
EUGENE SHAW FRYE

* * *

No. 173

WILLIE LEE JONES, JR.
v.
STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
*Levine
Eldridge
Orth
Cole,
JJ.

Opinion by Eldridge, J.
Murphy, C.J., concurs
in the judgments.

Filed: November 16, 1978

*Levine, J., participated in the hearing of the cases and in the conference in regard to the decisions but died prior to the adoption of the opinion by the Court.

I dissented in *Newton v. State,* 280 Md. 260, 373 A.2d 262 (1977), on the ground that convictions and the imposition of separate punishments thereon at a sigle trial of the distinct offenses of murder in the perpetration of an attempted robbery (felony murder) and the attempted robbery itself did not, under the applicable required evidence test, violate the double jeopardy clause of the federal constitution. I expressed the belief in *Newton* that the weight of authority supported that view. The subsequently decided Supreme Court cases of *Brown v. Ohio*, 432 U.S. 1161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), and *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), which the majority cites in support of the contrary view which it took in *Newton* deal with successive prosecutions and not, as here, with a single prosecution for multiple offenses. While undoubtedly the same double jeopardy principles are applicable to cumulative punishments for the same offense as well as to successive prosecutions for what in law amounts to the same offense, I will abide by my dissent in *Newton* until the Supreme Court makes it crystal clear that the double jeopardy clause bars separate punishments at the same trial upon conviction of felony murder as well as the underlying felony. Whether *Newton* was wrongly decided was not an issue encompassed by our certiorari grant in this case. I therefore concur in the judgments in these cases.